DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

BJG
Docket No: 4601-97
10 September 1999

[redacted]

Dear [redacted]

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552. The Board did not consider your request to remove your fitness report for 1 October 1993 to 24 June 1994 because it has not been filed in your Official Military Personnel File.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 8 September 1999. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the report of the Headquarters Marine Corps (HQMC) Performance Evaluation Review Board, dated 8 February 1999, and the advisory opinion from the HQMC Military Law Branch, Judge Advocate Division, dated 4 February 1999, copies of which are attached. They also considered your counsel's rebuttal letter 9 June 1999 with enclosures.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, the Board substantially concurred with the comments contained in the advisory opinion. They were not persuaded that the author of the advisory opinion needed to be questioned regarding any possible relationship he may have had with your administrative discharge proceedings. They noted that your counsel may question the author in this matter, and if any new and material evidence is discovered, it may be submitted to the Board with your request for reconsideration.

In view of the above, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be

taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosures

Copy to:
[redacted]

DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3280 RUSSELL ROAD
QUANTICO, VIRGINIA 22134-5103

IN REPLY REFER TO:

1610
MMER
8 Feb 99

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF NAVAL RECORDS

Subj: BCNR APPLICATION IN THE CASE OF FORMER MARINE MAJOR [redacted]

Ref: (a) Your Memo of 27 Oct 98
(b) [redacted]s DD Form 149 of 2 Jun 97

1. In reference (a), the PERB has been requested to provide an opinion regarding [redacted]s request to remove a fitness report.

2. The last performance evaluation contained in [redacted] Official Military Personnel File (OMPF) is an annual (AN) fitness report covering the period 15 May through 30 September 1993. It is not adverse in nature; neither does it document any of the matters being challenged in reference (b). Consequently, an Advisory Opinion by the PERB is not necessary.

D. J. CHRISTIANSEN
Head, Performance Evaluation
Review Branch
Personnel Management Division
Manpower and Reserve Affairs
Department
By direction of the Commandant
of the Marine Corps

APPLICANT'S EXHIBIT 118

DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
2 NAVY ANNEX
WASHINGTON, DC 20380-1775

IN REPLY REFER TO:
1070
JAM3
04 FEB 1999

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF NAVAL RECORDS

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION IN THE CASE OF FORMER M[redacted] U.S. MARINE CORPS

1. We are asked to provide an opinion regarding Petitioner's various requests that he be restored to active duty, that his resignation in lieu of court-martial be set aside, and that his characterization of service be upgraded.

2. We recommend that relief be denied. Our analysis follows.

3. Background

a. Petitioner served as Commanding Officer of Recruiting Station, Buffalo, New York, from 25 July 1992 until he was relieved for cause 30 December 1993. During that period, Petitioner sought to relieve for cause one of his recruiters, [redacted], because of a verbal altercation between [redacted] and his noncommissioned officer in charge (NCOIC), then [redacted] As required, Petitioner prepared a "relief package" for submission to higher headquarters justifying Petitioner's action. Rather than assert that [redacted] misconduct prompted his relief, Petitioner asserted that [redacted] recruiting production was inadequate. Petitioner allegedly used falsified production statistics in that package.

b. Petitioner's higher headquarters, 1st Marine Corps District, returned the package indicating it lacked sufficient substantiation. To "beef it up," Petitioner prepared a second package including two trip reports intended to prove that Staff [redacted] production had fallen despite Petitioner's efforts to train and motivate him. These trip reports were "reconstructed" after Petitioner's first relief package was rejected. As submitted to higher headquarters, the trip reports contained routing initials that had been photocopied from prior reports.[1] The trips these reports documented did not occur on the dates set out in the reports.

[1]During the subsequent investigation into the apparently false trip reports, Petitioner told the 1st District Executive Officer, [redacted] that he had photocopied the routing initials from earlier trip reports onto the ones he "reconstructed" so that they looked as accurate as possible. See Applicant's Exhibit 48. In Petitioner's own statement, he admitted

APPLICANT'S EXHIBIT 117

c. According to [redacted], Petitioner's Executive Officer, in two separate conversations, Petitioner claimed to have "found" the trip reports. In a conversation with his Recruiting Station [redacted], in an effort to explain why Petitioner's trip reports were not in the appropriate files, Petitioner stated that he had pulled them for review.

d. After an investigation into the circumstances of [redacted]'s relief, Petitioner was himself relieved on 30 December 1993. When relieved, he was ordered to have no contact with any member of the recruiting station and that further directions would come from the Commanding Officer, Executive Officer, or Adjutant of the 1st Marine Corps District. Despite this order, Petitioner made contact with the NCOIC of a recruiting substation, now [redacted] and with the acting Commanding Officer of the Recruiting Station in Buffalo, [redacted]

e. The actions above resulted in charges being preferred against Petitioner for disobeying a lawful order and making false official statements in violation of Articles 90 and 107, Uniform Code of Military Justice (UCMJ), respectively. An Article 32, UCMJ, investigation was conducted and the charges were ultimately referred to a general court-martial.

f. In return for the Government's withdrawal and dismissal of the charges against him, Petitioner requested to resign on 9 February 1994.[2] In this request, Petitioner admitted his guilt as to "one or more of the charges." His first resignation request was conditioned upon his receipt of a characterization of service no worse than general under honorable conditions. In his endorsement on Petitioner's request, the Commanding General, Marine Corps Recruit Depot/Eastern Recruiting Region, opposed giving Petitioner a general under honorable conditions characterization of service. In apparent response to this negative endorsement, Petitioner submitted an undated addendum to his resignation request indicating he would accept an other than honorable characterization of service.

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photocopying these initials. See Applicant's Exhibit 19.

[2]The initial request to resign, and the first and second addendums thereto, were signed by Petitioner and witnessed by his civilian defense counsel, [redacted]. They were apparently drafted by Petitioner's military defense counsel, [redacted], USMC, and faxed to [redacted] office in Buffalo, New York, where they were retyped.

g. Under paragraph 11.a(2) of enclosure (4), SECNAVINST 1920.6A, and paragraph 4106.3, MARCORSEPMAN, MCO P1900.16D (the version in effect in 1994), the Commandant of the Marine Corps may deny requests to resign in lieu of disciplinary proceedings. In an e-mail of 22 March 1994, the action officer responsible for processing all officer misconduct cases in the Military Law Branch (JAM), Judge Advocate Division, Headquarters Marine Corps, indicated that Petitioner's request to resign would be disapproved unless Petitioner plead guilty to all charges and indicating that his submission was voluntary and not the product of coercion.[3]

h. Petitioner submitted a "Second Addendum" dated 2 May 1994 to his request to resign. In this second addendum, Petitioner admitted guilt to all the charges and indicated that his request to resign was voluntary and not the product of coercion. The Secretary of the Navy subsequently approved Petitioner's request to resign and ordered his separation with an other than honorable characterization of service. Charges against Petitioner were withdrawn and dismissed. Petitioner later applied to the Naval Discharge Review Board (NDRB) to change both the basis of his separation and the characterization of service. The NDRB denied Petitioner's request to change the basis for separation but, as a matter of clemency, upgraded Petitioner's characterization of service to general under honorable conditions.

4. Discussion

a. Petitioner seeks, among other things, restoration, upgrade of his characterization of service, and removal of any adverse comments from his military personnel record. Petitioner's claim for relief is based upon the following arguments:

(1) Petitioner claims that his submission of his request to resign was "improvident" and the result of "undue command interference" and coercion. Petitioner feels his family and financial situation left him no choice but to resign to avoid being tried by court-martial. He claims he would have been "railroaded" at trial. He claims to have acted under this stress and from bad advice from both his military and civilian defense counsel when he submitted his resignation.

[3]Petitioner had apparently written to his Congressman indicating he was being "coerced." In light of this allegation, the Commandant of the Marine Corps apparently wanted to be assured that Petitioner's request to resign was voluntary and not the product of coercion before he would forward it to the Secretary of the Navy.

(2) Despite having admitted his guilt to all charges in his request to resign, Petitioner claims he is innocent of the charges.

b. Petitioner's claims do not merit relief.

c. Petitioner's allegation that his resignation was "improvident," the result of "undue command interference" or coercion is baseless. Petitioner inappropriately attempts to impose two legal theories applicable to courts-martial onto administrative processes. Moreover, Petitioner received the full benefit of his bargain. The Government withdrew and dismissed charges against him; Petitioner never faced court-martial or nonjudicial punishment proceedings. At this point, the five year statute of limitations on courts-martial, Article 43, Uniform Code of Military Justice (UCMJ), would prohibit the Government from bringing Petitioner to trial on these charges.[4] In other words, Petitioner's resignation gave him the substantial benefit of insulating him from criminal responsibility for his actions.

(1) Petitioner's claim that his resignation is "improvident" is an improper attempt to add legal requirements to the administration of military personnel not found in the U.S. Constitution, Federal statute, or service regulations. Petitioner seems to imply that requirements similar to those found in Rule for Courts-Martial 910, or Federal Rule of Criminal Procedure 11, for the acceptance of a guilty plea in a criminal trial, should added to a request for resignation. These requirements are established in a proceeding before a judge known as a "providence" inquiry. Guilty pleas not meeting the requirements are termed "improvident" and may be overturned. There are, of course, no such "providence" requirements imposed on the submission of requests to resign. When a Marine Corps officer submits a request to resign, and for which he obtains the significant benefit of withdrawal of criminal charges, the Secretary of the Navy is permitted to take the request at face value and need make no further inquiries about it.

(2) Petitioner was not the subject of "coercion" in the legally recognizable sense. Even accepting for the sake of argument that BCNR must review the voluntariness of a request to resign as a court would review the voluntariness of a guilty

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[4]Petitioner's alleged misconduct occurred in October 1993 and January 1994. The 5 year statute of limitations for trial by court-martial under Article 43 would bar any trial after January 1999. The statute of limitations for nonjudicial punishment is 2 years.

plea, Petitioner would not meet this standard.[5] The United States Supreme Court indicated in Brady v. United States, 397 U.S. 742, 750-51 (1970), that to invalidate a guilty plea, the defendant would have to show that the fear of the consequences of going to trial destroyed his ability to balance the risks and benefits of going to trial. Petitioner makes no such showing. Petitioner presents no evidence, for example, from either his military or civilian defense counsel, nor any other third party,[6] as to his state of mind when he signed his original resignation request in February 1994, or when he signed the two addendums, the latest of which was completed in May 1994. On the contrary, Petitioner's second addendum to his resignation affirms that he was not the subject of coercion. Moreover, Petitioner's request to resign garnered substantial benefits for him; Petitioner successfully avoided criminal prosecution for his offenses.

(3) Petitioner claims that the stress of paying his civilian attorney if he went to trial[7] and his wife's departure for Alaska led him to submit his request to resign. Again, Petitioner's assertion, if made to invalidate a guilty plea, would be rejected. Private pressures on a defendant are not usually a basis to invalidate a plea. See LoConte v. Dugger, 847 F.2d 745, 753 (11th Cir.), cert. denied, 488 U.S. 958 (1988) (pressure from friends to plead guilty did not invalidate plea because prosecution neither knew of nor sanctioned their behavior); cf. United States v. Pinto, 838 F.2d 1566, 1568 (11th Cir. 1988) (defendant cannot challenge plea simply because he followed advice of someone other than his criminal attorney); but see Iaea v. Sunn, 800 F. 2d 861, 866-67 (9th Cir. 1986) (attorney's threat to withdraw from case and brother's threat to take away bail may render a plea involuntary despite

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[5]We recommend that BCNR reject any efforts to add requirements to the resignation process not found in any statute or regulation. The Secretary of the Navy is entitled to act upon those documents a Marine Corps officer submits and is entitled to presume that they voluntary.

[6]We recognize Petitioner himself has made such claims. However, we view such post hoc rationalizations with great skepticism. It is particularly hard to believe that Petitioner's will was overborne in these circumstances given his successful tour in combat in Desert Storm/Shield, and in his being hand selected for recruiting duty, the most pressure-filled peacetime assignment one can undertake.

[7]In any event, even if Petitioner elected not to retain his civilian counsel for trial, Petitioner would have continued to have the services, without charge, of a military counsel. Moreover, Petitioner could have requested an additional military counsel, if he wanted.

lack of government coercion).[8] Even so, under [redacted] Petitioner must still demonstrate that these pressures rendered him unable to balance risks versus benefits of his course of action. Petitioner has presented no independent evidence to support this claim.

(4) Petitioner asserts that he was pressured by his military and civilian defense counsel to resign and that he did not receive adequate advice. Petitioner is essentially claiming that he received "ineffective assistance of counsel." Again, using the analogy to guilty pleas at trial, the United States Supreme Court in Hill v. Lockhart, 474 U.S. 52, 56 (1985), held that to set aside a guilty plea for ineffective assistance of counsel, the defendant would have to show (1) his counsel's assistance was not "within the range of competence demanded of attorneys in criminal cases;" and (2) a reasonable probability exists that he would not have pleaded guilty had his counsel been competent. Petitioner has demonstrated neither prong of Hill. Petitioner has presented no opinions from legal experts indicating that the legal services provided to Petitioner were not within an acceptable range of competence.[9] In fact, due to his counsel's efforts, Petitioner successfully avoided any possibility of criminal prosecution. Petitioner's claim that he would not have resigned if he had had other legal advice is simply not credible. Of course, such claims are easier to make now that the statute of limitations has run.[10]

(5) Petitioner's allegation that Headquarters, U.S. Marine Corps, asserted "undue command interference"[11] is without basis. Petitioner is again inappropriately attempting to apply court-martial standards to the resignation process. Under SECNAVINST 1920.6A, the Secretary of the Navy is the only

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[8]Petitioner's pressures in no way rise to the level of those presented in the Sunn case. Petitioner faced no immediate loss of liberty or withdrawal of counsel if he elected to proceed to trial instead of resigning.

[9]In our view, the assertions of Petitioner's present counsel that the previous counsel rendered ineffective assistance of counsel would not be sufficient by themselves. Furthermore, Petitioner has not presented affidavits evidencing the views of his prior attorneys as to the services they provided.

[10]Of course, at the time of Petitioner's second addendum on 2 May 1994, Petitioner stated he was satisfied with his military counsel's services. He specifically repudiated prior statements critical of his military defense counsel, indicating they were largely based on his own misunderstandings. As to his civilian defense counsel, [redacted], Petitioner has presented no independent evidence that he was dissatisfied with Mr. [redacted] services.

[11]Petitioner's counsel seems to use the phrases "undue command interference" and "undue command influence" interchangeably.

authority in the Department of the Navy who may grant a Marine Corps officer's request to resign. Paragraph 11.a(2) of enclosure (4) of that instruction delegates to the Commandant of the Marine Corps the authority to deny such requests. Petitioner claims that Headquarters, U.S. Marine Corps, exercised "undue command interference" by indicating that Petitioner's request to resign would be denied unless Petitioner pleaded guilty to all charges, and unless Petitioner affirmed that his request was voluntary.[12] Because the Commandant of the Marine Corps had the legal authority to deny Petitioner's request, he was entitled to state the basis upon which he would accept and forward the request. The Commandant was particularly entitled to be sure that Petitioner's actions were voluntary in light of Petitioner's allegations of coercion to his Congressman. The Commandant's action in no way inhibited Petitioner's full exercise of his rights to trial by court-martial under the UCMJ, nor did it impinge on the discretion of any junior commander (because no junior commander had authority to act on the resignation request). The Commandant's action did not, therefore, amount to "undue command influence" under Article 37(a), UCMJ,[13] or "undue command interference."

d. Petitioner argues that despite his admission of guilt to the charges, he is factually innocent. Petitioner's counsel indicates that this innocence is "proven" by Petitioner's voluminous submissions. Unfortunately, little can be "proven" at this stage since, in reliance on Petitioner's request to resign, the Government withdrew charges against him, and now the statute of limitations would bar any trial.[14] In any event, the question

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[12]The e-mail Petitioner refers to was sent by the action officer at Headquarters, U.S. Marine Corps who was responsible for handling all officer misconduct cases. His actions should be, we agree, imputed to the Commandant of the Marine Corps.

[13]Article 37, UCMJ, establishes the prohibition on "undue command influence" for proceedings under the UCMJ. Article 37(a) states in part that "No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-marital or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts." Under the UCMJ, each level of command is imbued with the discretion to exercise disciplinary authority. The prohibition on "undue command influence" is intended to protect the commander's prerogative to exercise this disciplinary discretion. This concept is inapplicable to the resignation process because only the Secretary of the Navy and the Commandant of the Marine Corps exercise any discretion as to whether a request to resign is granted or denied.

[14]Petitioner gained the full measure of his bargain by having the criminal charges dismissed. Now that there is no possibility of a trial by

is not whether Petitioner would have been convicted beyond a reasonable doubt at trial, but whether the Secretary of the Navy's action in accepting Petitioner's request to resign and separating him with a general under honorable conditions characterization of service (as upgraded by the Naval Discharge Review Board) is fair and just based on the information available.

(1) To begin, because Petitioner's action in submitting his resignation, including his admission of guilt, leaves us without a fully developed record, the available material should be examined in the light most favorable to the prosecution (not Petitioner). With that in mind, we reviewed the available evidence for each charge and specification. We conclude that the preponderance of evidence, and the reasonable inferences drawn therefrom, make Petitioner's separation with a general (under honorable conditions) discharge fair and just. We will examine each charge individually.

(2) Petitioner also claims that his relief for cause and the charges against him were the result of personal animus on the part of the Commanding Officer, 1st Marine Corps District, Colonel Priestly. Petitioner alleges that [redacted] was jealous of Petitioner's greater experience in recruiting and that [redacted] was trying to divert attention from the fact that 1st Marine Corps District was itself struggling to make its recruiting mission. Certainly, at trial, this issue could have been fully resolved. Petitioner presents no affidavits from [redacted] concerning his motivations for relieving Petitioner and for forwarding charges to the [redacted] Commanding General, Marine Corps Recruit Depot/Eastern Recruiting Region. Moreover, the decision to refer charges to trial lay with [redacted] and Petitioner makes no allegations of personal animus on the part of this general officer. Further, the discretion to accept Petitioner's resignation, order his separation, and assign a characterization of service, lay solely with the Secretary of the Navy. Petitioner makes no allegation of personal animus on the part of the Secretary of the Navy. Consequently, we are satisfied that personal animus, if any, does not impugn Petitioner's separation or characterization of service.

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court-martial, Petitioner intends to renege on the agreement. Because Petitioner requested and was allowed to resign, instead of a fully developed record of trial, Petitioner bears the burden of establishing his claims.

(3) The first specification of the charge of false official statement alleged that Petitioner submitted false trip reports indicating that he had provided training to [redacted] on two occasions.[15] If the matter had proceeded to trial, the prosecution's evidence would have included the reports themselves with their erroneous dates and "doctored" routing initials. [redacted] would have testified that no trips occurred on the dates indicated in the reports. The evidence would have also included (a) Petitioner's written statement admitting he photocopied routing initials; (b) Petitioner's statement to [redacted] that he photocopied the routing initials from a prior report so that his reports would look as accurate as possible; (c) Petitioner's two statements to [redacted] that he "found" (not reconstructed) these reports; and (d) Petitioner's statement to Sergeant [redacted] that the reasons these trip reports had not been in the file was because he had "pulled" them.

(a) Petitioner claims that he "reconstructed" those reports and that he simply made a "mistake of fact" as to the dates. Consequently, Petitioner claims he had no intent to deceive, a required element of the offense of false official statement. See paragraph 31b(4), Part IV, Manual for Courts-Martial, United States (1984 edition). Our position is that at trial, the Government would have shown that this was part of Petitioner's effort to bolster his case for his firing [redacted]r, based on failure of production, not misconduct. Petitioner went to great efforts to present his trip reports as contemporaneously completed records. We would assert that if the reports had been completed contemporaneously (i.e., before Petitioner began his search for a reason for firing [redacted]r), it is likely they would not have been as negative. Petitioner clearly cared little about the accuracy of the dates, so it is likely that he paid little attention to the accuracy of the report either.

(b) Petitioner's explanation for the doctored routing initials and his efforts "clarify" his inculpatory statements to others projects a highly improbable alignment of disloyal, inaccurate, or misperceiving officers and noncommissioned officers of Marines. First, Petitioner asserts that his disloyal Operations Officer, [redacted] must have been responsible for the doctored initials. Second, Petitioner claims he was rushed to complete his own written statement and did not really

[15]The charges referred to trial by general court-martial are found at Applicant's Exhibit 52.

read it. This begs credibility since Petitioner apparently had time to correct three prior drafts. Third, Petitioner claims [redacted] did not accurately record Petitioner's statement to him where Petitioner admits photocopying the routing initials. Fourth, Petitioner claims that he told [redacted] he found his "notes" not the actual trip reports, and that [redacted] misheard him. Fifth, Petitioner claims that his statement to [redacted] that he had "pulled" the trip reports was "general" in nature -- Petitioner claims he was not talking about his specific trip reports, but all trip reports related to [redacted]. Petitioner presents no affidavits from these Marines confirming that they misperceived or mistakenly recorded what Petitioner told them.

(c) In our view, Petitioner's claimed string of errors, misperceptions, and intrigue begs credibility. Petitioner could have tested these tortured hypotheses at trial. However, Petitioner admitted his guilt to these offenses and successfully avoided trial (and all criminal responsibility) by requesting to resign. Because the Secretary of the Navy reasonably relied on Petitioner's own admissions of guilt and his request to resign, it is improper and unfair to now try Petitioner's offenses 5 years after the fact before BCNR. In any event, besides Petitioner's contemporary admission of guilt, we find there is a preponderance of evidence, taken in light most favorable to the prosecution, to support this charge and specification as a basis for separating Petitioner and assigning him an other than honorable characterization of service.

(4) The second specification of false official statement alleges that Petitioner submitted false production statistics in his efforts to justify his relief of [redacted] Petitioner claims that his calculations were an acceptable method of calculating production. He further claims that if there were any errors they were the responsibility of his disloyal Operations Officer, [redacted] provided a statement indicating that he told Petitioner that the manner Petitioner calculated [redacted] numbers was wrong.[16] We find sufficient basis to conclude that, in Petitioner's search for evidence to support his firing Staff [redacted] for lack of production (as opposed to misconduct), Petitioner did whatever he could to make the statistics look bad. Certainly [redacted] viewed these statistics as false. In any event, besides Petitioner's

[16]Captain Woolley's statement is Applicant's Exhibit 21.

contemporaneous admission of guilt, we find there is a preponderance of evidence, taken in the light most favorable to the prosecution, to support this specification as a basis for separating Petitioner and for assigning him an other than honorable characterization of service.

(5) The third and fourth specifications under this charge allege false official statements for Petitioner's comments to both [redacted][17] and [redacted] regarding the origination of the "reconstructed" trip reports. Petitioner told Captain Wright on two occasions that he "found" the trip reports, as opposed to reconstructed them. When questioned by Sergeant [redacted] about why Petitioner's two new trip reports had not been in the files, Petitioner told [redacted] that the reason they were not in the file was because Petitioner had pulled them for review. Again, Petitioner asserts that these Marines either misperceived or mistook his statements. Petitioner presents no affidavits from these Marines confirming this assertion. Without such corroboration, we find Petitioner's contention to be highly suspect. In addition to Petitioner's admission of guilt to these specifications, we find there is a preponderance of evidence, taken in the light most favorable to the prosecution, to support both specifications as bases for separating Petitioner and for assigning him an other than honorable characterization of service.

(6) Petitioner was charged with two specifications of violating the lawful order of a superior commissioned officer in violation of Article 90, UCMJ. When Petitioner was relieved, Colonel Priestly, the Commanding Officer, 1st Marine Corps District, ordered Petitioner to collect his personal effects and leave the Recruiting Station. Colonel Priestly also ordered Petitioner to have no contact with any member of the Recruiting Station. Despite this order, Petitioner called the NCOIC of a recruiting substation, Master Sergeant Zulaski, and asked him to gather documents. Later the same day, Petitioner arrived at the Recruiting Station in Buffalo in person to drop off a request for documents with the acting Commanding Officer, Captain Sasone.

(a) Petitioner contends that Colonel Priestly's order was not a lawful order because it interfered with Petitioner's right to gather evidence in his defense. A fully developed trial record would have had additional evidence discussing the valid military necessity for an individual relieved from recruiting

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[17] [redacted]'s statement is Applicant's Exhibit 20.

[18] Sergeant Major Trubilla's statement is Applicant's Exhibit 22.

duty to have no contact with his former subordinates. In any case, orders from superiors are presumed valid in military law. See paragraph 14c(2)(i), Part IV, Manual for Courts-Martial, United States (1984 edition). Moreover, we readily find several valid military reasons a commander might issue such an order. For instance, the commander may be concerned about negative impacts on recruiting production and morale, if the relieved Marine was allowed to remain around his coworkers. Secondly, the commander might be concerned about the relieved Marine seeking some kind of retribution on those he might feel were responsible for his being relieved. Thirdly, the commander might be concerned about preserving evidence and preventing a further "doctoring" of records.

(b) Petitioner contends [redacted] order violated his right to gather evidence in his defense. That is patently wrong. Defendants have no general constitutional right to discovery. Weatherford v. Bursey, 429 U.S. 545, 559 (1977). Under the Rule for Courts-Martial 701, Petitioner's right to discover evidence against him to prepare for trial is triggered by the service of charges. The first charges against Petitioner were drafted after Petitioner's violation of [redacted] order. Moreover, rather than violate the order, Petitioner could have (1) sought permission to contact individuals to gather evidence; or (2) submitted his requests for documents directly to [redacted]. At his own peril, Petitioner chose instead to make direct contact with Recruiting Station personnel in direct violation of [redacted]s order. Petitioner does not contend that he was unable to prepare for trial. In any event, besides Petitioner's admission of guilt to these specifications, we find there is a preponderance of evidence, taken in the light most favorable to the prosecution, to support both specifications as bases for separating Petitioner and for assigning him an other than honorable characterization of service.

(7) In short, we contend that the available evidence, along with Petitioner's admission of guilt, more than justified the Secretary of the Navy's acceptance of Petitioner's resignation, ordering his separation, and characterizing Petitioner's service as other than honorable. We would also observe that the Secretary's action would be justified should BCNR find that even one specification provides a sufficient basis for action.

5. Conclusion. Petitioner's claims of error or injustice are without merit. Petitioner requested to resign in return for the

dismissal of criminal charges against him. Petitioner received the full benefit of his bargain; the charges were dismissed, the statute of limitations has run, and Petitioner cannot be tried by court-martial for his offenses. The Secretary of the Navy took Petitioner's request to resign and admission of guilt at face value, as he was entitled to do. The Secretary of the Navy's decision to separate Petitioner and characterize Petitioner's service as other than honorable (upgraded as a matter of clemency to general under honorable conditions) is fully supported by the record and amounts to neither an error nor an injustice. Accordingly, we recommend relief be denied.

M. W. FISHER, JR.
Lieutenant Colonel
U.S. Marine Corps
Head, Military Law Branch
Judge Advocate Division
By direction of the
Commandant of the Marine Corps

DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

BJG
Docket No: 4601-97
9 September 1999

NEIL B KABATCHNICK ESQ
1050 SEVENTEENTH ST NW
WASHINGTON DC 20036

Dear Mr. Kabatchnick:

This is in reference to your interest, as counsel, in the case of Mr. Robert W. Rall.

Enclosed is a letter addressed to your client informing him that his application has been denied. It is requested that you transmit the denial letter to Mr. Rall, a copy of which is enclosed for your records.

It is regretted that a more favorable reply cannot be made.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosures